UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Devi Khoday and
Danise Townsend,

Plaintiffs,

vs.

Symantec Corp. and
Digital River, Inc.,

Defendants.

File No. 11CV180
(JRT/TNL)

Minneapolis, Minnesota
January 12, 2015
11:15 A.M.

BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

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11:15 A.M.

(In open court.)

THE COURT: You may be seated. Good morning, everyone. This is Civil Case Number 11-180, Devi Khoday and Danise Townsend versus Symantec Corporation and Digital River, Incorporated.

Let's have counsel note appearances, starting with the plaintiffs, please.

MR. FRIEDMAN: Good morning, Your Honor. Andrew Friedman with Cohen, Milstein, Sellers & Toll for the plaintiffs.

MR. AXELROD: Good morning, Your Honor. Matt Axelrod also with Cohen Milstein for the plaintiffs.

THE COURT: Good morning.

MR. McNAMARA: Doug McNamara also with Cohen Milstein for plaintiffs.

MS. BAXTER-KAUF: Kate Baxter-Kauf with Lockridge Grindal Nauen also for plaintiffs.

THE COURT: All right. Good morning.

MR. GIBBS: Good morning, Your Honor. Patrick Gibbs from Latham & Watkins for Symantec, along with Mr. Gaskins, and Carrie Flynn from Symantec Corporation is here with us at counsel table.

THE COURT: Good morning to all of you.

MS. VAN GELDER: Good morning, Your Honor. Amy Van Gelder from Skadden Arps for Digital River.

MS. FROGGE: Good morning, Your Honor. Jessica Frogge from Skadden Arps for Digital River.

MS. LAPE: Good morning. Marcella Lape from Skadden Arps for Digital River.

THE COURT: All right. Good morning to everyone. We have a number of motions this morning, primarily the summary judgment motion and then motions regarding the experts as well and an unopposed motion for modification of the class order. The Court has read the briefs in preparation.

How are we going to begin? Do you have a plan?

MR. FRIEDMAN: Your Honor, we have broken it out depending upon which motions you want to do first. I will be doing the plaintiffs' *Daubert* motions. Mr. Axelrod will be doing the summary judgment opposition. Mr. McNamara will be doing the defensive *Daubert* motions.

THE COURT: All right. Why don't we start with the summary judgment motion, if that's okay?

MR. GIBBS: That's fine, Your Honor.

THE COURT: All right. Go ahead, Mr. Gibbs.

MR. GIBBS: Thank you, Your Honor. Your Honor, Symantec is entitled to summary judgment because Plaintiff Devi Khoday has failed to prove that she suffered any harm

from her purchase of Norton download insurance from Symantec, and in any event, even setting aside the question of whether she suffered harm, she has failed to put forth evidence that she suffered any particular amount of harm, and therefore, there is not evidence from which a trier of fact could award her damages in this case.

I think there is no dispute between the parties that each of Ms. Khoday's claims against Symantec requires proof of harm caused by something Symantec did, and in this case, that is the, the sale to her of Norton download insurance.

Ms. Khoday's theory is that she was harmed because she spent money she would not have spent if she had known about what we call the work-arounds, what plaintiffs call the free alternatives, to download insurance. In other words, her theory is, if she had known about these work-arounds, she would not have purchased Norton download insurance.

During her deposition, however, Ms. Khoday made a series of key admissions that are flatly inconsistent with her theory of harm in this case and which in our view would preclude any rational trier of fact from finding in her favor. Now, Khoday testified that after seeing "what's this" pop up in her shopping cart and reading the description of the product found there, she decided to

purchase NDI as what she called a precaution.

She wanted to have NDI in case she needed to download her software more than 60 days after the date of purchase. In other words, she wanted to ensure, and "ensure" was her word, e-n-s-u-r-e, she wanted to ensure that her software would be there if for any reason she needed to re-download it after 60 days.

In short, what Ms. Khoday was looking for, according to her own testimony, was the certainty that if she needed to re-download or download the product more than 60 days after the date of purchase, it would be there.

During her deposition, Ms. Khoday admitted that if Symantec had the right to stop allowing these work-arounds, and that's a right that Symantec very clearly had, then she may have purchased NDI even if she had known about the work-arounds in order to ensure the ability to re-download her product at any time during the license.

In other words, even if she had known about the work-arounds, if she had also known that Symantec had the right to stop allowing the work-arounds at any time, she may have bought it in order to get the certainty that she wanted.

In fact, this certainty was so important to Ms. Khoday, she admitted that if Symantec had the right to stop allowing the work-arounds, then the failure to

disclose the work-arounds at the point of sale would not even be a material omission as to her.

Now, in light of these admissions, Khoday will not be able to prove that she suffered harm when she bought NDI from Symantec because she will not be able to prove that she would have done something different if she had known the truth.

Now, plaintiffs spent a lot of time citing testimony from Ms. Khoday where she said she would not have bought NDI if she had known about the work-arounds. You know, there are several problems with that testimony. First of all, Ms. Khoday cannot create a factual issue by contradicting her materiality testimony.

Second of all, it's clear from the entire record that when Ms. Khoday was testifying she would not have bought NDI if she had known about the work-arounds, she was simply assuming equivalence between NDI and the work-arounds. In other words, as to the product feature that she cared about, certainty, she was assuming that the work-arounds were just as certain as NDI.

And that's why when confronted in her deposition with the notion that Symantec did not have to keep providing the work-arounds, she conceded she may have bought it anyway even if she had known about the work-arounds because what she cared about was making sure,

being certain, that the product would be there.

Now, even setting aside the fact of damages, we also argue that Khoday will not be able to prevail in this case, and no reasonable trier of fact could find in her favor because she has not put forward evidence from which a trier of fact could affix a specific amount of damages to her, could award a specific amount of damages.

The plaintiffs have basically teed up two theories of damages here. One is a total refund. They have suggested that Khoday ought to be entitled to a refund of the entire amount of money that she paid for Norton download insurance. The problem with that theory is, Khoday has testified very clearly that what she wanted was certainty, and she got certainty.

She got a legal right to re-download her software at any time during the life of her license. Now, there has been some suggestion during this case that someone who buys NDI but doesn't actually end up having to use it to re-download somehow has not gotten any value out of the product, but Ms. Khoday herself has flatly disagreed with that notion, and she has made very clear that it was essentially the peace of mind.

It is not whether you have to use it. It's knowing you have the ability to do it if you need to. That's what she valued, and that's what she got. So I

think there is no legitimate dispute that she got some value out of the product. So the plaintiffs have also suggested that even if she and other consumers got some value out of the product, Ms. Khoday would be entitled to recover the difference between what she paid and the value of what she got.

The problem is, the plaintiffs have not put forward any evidence from which a trier of fact could reach any conclusion about the value of what she got. They point to testimony from their expert, Mr. Gaskin, who we are all trying to distinguish from Mr. Gaskins.

THE COURT: Confusing in this case.

MR. GIBBS: It is at times. The problem there is, by his own admission, Mr. Gaskin's analysis simply doesn't apply to the thing that Ms. Khoday said she valued. In fact, Mr. Gaskin admitted repeatedly that his conjoint analysis valued only one attribute of EDS and NDI, and that is the automatic key injection, which is what we would say is one of many convenience features of the product.

Ms. Khoday has made very clear, convenience had nothing to do with it for her. She did not buy this product based of convenience. She placed no value on convenience. The thing she valued was certainty, and Mr. Gaskin made no effort, no effort at all, to place some value on the certainty that one gets out of EDS and NDI

versus the work-around.

And where that leads us is nothing but speculation. In their briefing, plaintiffs suggest that having been given Mr. Gaskin's analysis of the value of automatic key injection, the jury can somehow use what they call common sense to value a totally different attribute of the product.

Now setting aside the many other problems with Mr. Gaskin's analysis, which we will get to later, there is no basis for suggesting they could use an expert's testimony about the value of automatic key injection and somehow calculate a rational value for a totally different feature, which is the certainty compared with the uncertainty of the work-around.

So we're left with essentially zero evidence from which a trier of fact could rationally figure out the difference between what Ms. Khoday paid for the product and the value of what she actually got, and for that reason, Symantec is entitled to summary judgment because there has been a failure of proof as to the amount of damages.

With that I will be happy to respond to anything plaintiffs want to say about it, but I don't want to get too much into what we said in the briefs.

THE COURT: All right. Thank you, Mr. Gibbs.

Go ahead.

MR. AXELROD: Good morning, Your Honor. Symantec's entire motion hinges entirely on two things, an incorrect understanding of the law and inadmissible evidence. Let me talk first about the incorrect understanding of the law.

Symantec's argument is that Ms. Khoday can't prove she suffered any harm because the alternatives to NDI weren't equivalent to NDI, and because the alternatives weren't equivalent, you just heard Mr. Gibbs say this, Symantec couldn't possibly have had an obligation to disclose their existence, but equivalence is not what the law requires.

The law requires just that Ms. Khoday show that there was a representation or omission likely to mislead or deceive the consumer and that the misrepresentation was material to the consumer's purchasing decision. Symantec had made essentially the same argument at the class certification stage, and Your Honor already rejected them.

You already ruled that, and this is quoting from your class certification ruling, quote, "Because the misrepresentations relate to the necessity of the products, a reasonable jury could find that the fact that download insurance was not the only means to re-download Norton products would have been material to a customer making a decision about whether to purchase download insurance at

the point of sale," end quote.

Now, Symantec is arguing that despite your earlier ruling, they deserve summary judgment as to Ms. Khoday's claim because the evidence pertaining to her individual purchase decision rebuts the presumption of materiality that Your Honor held to apply, but that's just plain wrong given the evidence in the record.

There is more than sufficient evidence to carry Ms. Khoday's burden of proof before the jury. First, there was a misleading representation.

THE COURT: Let me ask you a question about that.

MR. AXELROD: Sure.

THE COURT: The so-called "what's this" link --

MR. AXELROD: Mm-hmm.

THE COURT: -- had a provision that says it extends the time period beyond the 60 days. Are you relying on that word "extends" for the material misrepresentation claim, or is it the entire "what's this" link?

MR. AXELROD: Well, it's a couple of things, Your Honor. I would say it's the entire link, but the word "extends" is a part of it, as Ms. Khoday testified at her deposition. The pop up descriptor led her to believe that the only way to, quote unquote, "extend" her 60-day download period was to buy NDI.

So she read the descriptor, and in particular I think that that word "extends" is something she focused on in her deposition answers as giving her the impression that it was absolutely necessary to purchase NDI if she wanted the ability to download beyond the 60-day window.

In addition to that, and there is a number of citations in her, in the transcript where you can see exactly how she explains that. These are all attached to Exhibit 2 of the McNamara declaration. There are scattered excerpts of her deposition at pages 27, 80 to 81, page 83, pages 88 to 89, pages 106 to 107 and pages 144 to 145.

But in addition, Your Honor, the misrepresentation was exacerbated by the fact that NDI was auto populated into her cart, and you mentioned this and referenced this in your class certification ruling. Ms. Khoday also mentioned it during her deposition testimony.

She testified that by putting the product in her cart automatically, the defendants further reinforced the message that the product was necessary if a consumer wanted to be able to download beyond the 60-day limit. That's at pages 163 and 164 of her deposition testimony.

In preparing for the hearing, I noticed that page 164 was provided to you as one of the excerpts. Page 163 was not. I have provided it to counsel before the hearing.

I would like to hand it up, if that's okay.

So page 163 and then on to page 164 talks about the auto population feature and how that reinforced her belief that because of what was in the pop up descriptor that in order to extend, in order to be able to download beyond the 60 days, there was no alternative other than NDI, NDI was necessary.

So that's the misleading representation as to Ms. Khoday, Your Honor; and second, Ms. Khoday testified at her deposition that had she been made aware of the free alternatives, she would not have purchased NDI. She got asked that question, and those were, that was the answer she gave. That's at page 149 and at page 151 of her deposition, and that's more than enough to get to a jury on her individual claim, Your Honor.

Symantec misleadingly implied to its customer that NDI was required, was essential, if they wanted to extend the download period beyond the 60 days, both through the text of the pop up, the whole pop up and the word "extends" and through the auto population feature, and that misrepresentation was material to Ms. Khoday's individual purchasing decision.

THE COURT: What about the argument that Symantec makes that only NDI could absolutely guarantee access after the 60-day period? What's your response to that, that in

theory would make it different from the other work-arounds or download options?

MR. AXELROD: A couple of things. First, this is a disclosure case, so the fact that they weren't perfectly equivalent doesn't matter. What matters is that Ms. Khoday was told, the only option you have to download beyond the 60 days is NDI, and that wasn't true.

NDI is not a perfectly similar or exactly similar in all respects as the free alternatives, but that doesn't mean that the free alternatives weren't necessary to be disclosed because that was information that she wanted to have, and she testified information that she would have made a different decision had she been aware of.

Beyond that, Your Honor, Ms. Khoday, it's an interesting wrinkle in this case that Ms. Khoday was actually the purchaser of what's called a multi user product. So in other words, she was allowed to, when she made the purchase, she had the right to download the -- her software onto multiple machines.

THE COURT: Mm-hmm.

MR. AXELROD: Symantec's only method to allow the purchase of a multi user to get the software onto more than one machine was through the free alternatives. The download links that they had on their customer service page was the official sanctioned method that Symantec provided

to multi users to get the software onto multiple machines.

So they did commit to Ms. Khoday that she would be able to, when she purchased the multi user pack, be able to use the product, download the product onto multiple machines, and the method that they provided her to do that was through the download links, which was, in other words, one of the free alternatives.

So they could not have removed the free alternatives because then they would not have allowed her to fulfill the obligation that they had -- they would not be able to fulfill the obligation that they had made to her, which was the ability to download on multiple machines.

Moreover, as a practical matter, as a practical matter, they couldn't have removed, they couldn't have removed the free alternatives. It was, they needed them because as a customer service matter they needed them. They needed them because it was in, a large part of their business was the renewal business, and the renewal business doesn't work if you don't have the software on your machine, and so the download links help people to do that.

Then one other thing, Your Honor, was when Ms. Khoday made her individual purchase, she got a receipt promising her easy access to her Norton download account so she could easily reinstall if she needed to. That was what

they are now saying are the free alternatives they could have removed at any minute, but they had committed to her that she would have had that access.

And the evidence in the record is completely devoid of any suggestion that they ever contemplated, let alone took steps, to remove any of these alternatives. There is just no evidence of that whatsoever because of all these reasons. They really as a practical matter could not have done that, Your Honor, and now sort of after the fact, their lawyers have come up with this theory that, oh, it was all about the guarantee.

But when you look at the evidence at the time, the e-mails, the documents at the time, that is not what was going on. In addition, Your Honor, the testimony that, of Ms. Khoday at her deposition that Symantec relies so heavily upon for this point, right, they say that because they weren't -- Mr. Gibbs said, Ms. Khoday was all -- only concerned about certainty, wanted to make sure there was certainty.

Well, first of all, Ms. Khoday never says that in her deposition. That, that's not her testimony. Secondly, the question, the answers that Mr. Gibbs relies on and that Symantec relies on, they're cherry picked, inadmissible snippets of her testimony. She was asked a series of improper questions by defense counsel, not this defense

counsel but another lawyer at the firm.

The questions called for both speculation and legal opinions. She was essentially asked, if Symantec had the ability to remove the free alternatives, would that failure to disclose the existence of those alternatives be a material omission, and there are two problems with this type of question.

First, if this happened, would something be so, it's a textbook example of an improper question calling for speculation. I'm sure Your Honor sustains objections to those types of questions in this courtroom all the time. Second, asking a lay witness whether something would be a, quote unquote, material omission, which is a legal term of art, is a textbook example of an improper question calling for a legal conclusion.

The questions did not ask whether something would have influenced her individual purchasing decision. Instead, the questions used a very specific legal term, "material omission." Asked repeatedly, was this a material omission, was that a material omission, and you can see this in the transcript in the excerpts provided with Symantec's summary judgment papers in the Gibbs' declaration Exhibit 12. It is at pages 97, 101, 102, 107, 108 and 109.

And what you'll see is that plaintiffs' counsel

repeatedly objected to these questions saying, quote, "Objection to form. Calls for a legal conclusion," end quote. Symantec is now appearing to argue that those questions weren't asking for a legal conclusion. They were asking whether certain omissions were material to Ms. Khoday's original purchasing decision, but this argument fails on two levels.

First, reading of the excerpts that Symantec did provide you in their filing shows quite clearly that the questions were not about the individual purchasing decision but were general questions about whether certain things were or were not material omissions.

Second, if you look at page 85 of the transcript, which was not provided in Symantec's papers but was provided in ours in the McNamara declaration, it shows you how that material omission line of questioning started. It started by defense counsel referring to an interrogatory answer, and it's plain that defense counsel's questions were seeking to use the interrogatory answer to elicit improper legal conclusions from a lay witness.

So the answers to those questions are inadmissible, and they're improper, and plaintiffs' counsel said so at the time. So they can't now be used here to support summary judgment, and they similarly rely on another series of improper hypothetical questions that

called for speculation. This gets a little bit to the question Your Honor raised earlier.

At page 149, defense counsel asked, quote, "Would you have purchased NDI if you had been informed that although you could at that time re-download your Norton software without charge from the customer service web page that Symantec could remove those downloads at any time," end quote.

That's the question that's asked. Plaintiffs' counsel objects to the form and rightly so. It's both an improper hypothetical question, and it calls for speculation. Ms. Khoday answers, quote, "I'm not sure. I may or may not have," end quote.

Your Honor, this is a perfect example of why the rules of evidence don't permit hypothetical questions of lay witnesses, because it's likely the witness's answer will be, I don't know. That's not what happened, so I'm not really sure.

Also, it was an incomplete hypothetical. Defense counsel didn't ask if the disclosure said, quote, and then came up with a specific text of the disclosure to ask Ms. Khoday about. Instead it was asked very generally, and then in addition, as I mentioned earlier, it's a completely counter factual hypothetical because the reality is that it would have been practically impossible for Symantec to have

removed the alternatives.

THE COURT: Is there anything in the factual record that has been developed during discovery concerning Symantec's right to remove the alternatives?

MR. AXELROD: I don't believe, I don't believe so, Your Honor. I know that there is nothing in the, in the factual record that indicates that they ever contemplated doing so, they ever discussed doing so. Certainly there is no evidence that they did so because they were available the whole time.

As to your specific question as to whether there is anything about whether they had a right to remove them at any time, that I'm not certain of, although I don't believe so, but I'm sure Mr. Gibbs will tell me if I'm wrong on that score.

So I guess that's, that's our argument. Actually, let me turn to damages for just a minute or two. The damages issue is a red herring, Your Honor. There is, as Your Honor already ruled in the class certification ruling, this is a total refund case.

There is evidence in the record, and we'll have a, depending on how the *Daubert* motions get resolved, I guess, but we anticipate having an expert who can testify as to what those total refund damages will be. We also are providing, in an abundance of caution, plan to provide the

jury with an alternate measure of damages if they do believe that there should be some amount subtracted for the convenience value to account for the difference between the automatic key injection and the nonautomatic key injection.

The fact that we don't have an expert who calculated the value of some sort of guarantee is irrelevant because, as I have said earlier, Your Honor, we don't think the guarantee matters. As a legal matter, the point is that they didn't disclose the existence of these alternatives, and if the jury does want to make some adjustment to the damages if the jury thinks that the guarantee does matter, it's well within the jury's province to reduce the amount that has been provided to them by the experts.

There is no requirement that specific expert testimony be provided on a particular attribute like that in order for a jury to be able to return an actual damages figure. So in sum, we believe, Your Honor, that Symantec's motion should be denied. It misapprehends the law, relies entirely on inadmissible evidence obtained through improper deposition questioning.

There are genuine disputes as to material facts here, and it's should be up to the jury to decide whether to resolve them in favor of Ms. Khoday or in favor of the defendants.

THE COURT: Thank you.

Mr. Gibbs?

MR. GIBBS: Thank you, Your Honor. Let me begin by picking up with Your Honor's question about whether there is any evidence in the record about whether Symantec could remove the work-arounds.

Ms. Khoday herself flatly admitted that it could, and this appears at page 123 of her deposition transcript, which is attached to my declaration. She was asked: "Was Symantec required to offer Trialware?"

And she answered: "No, they are not required to do anything."

She was asked: "Was Symantec required to offer downloads on its support website?"

She answered: "No."

She was asked, "Was Symantec required to allow customers who contacted consumer support to re-download their product?"

She answered: "No."

That is the evidence in the record about whether Symantec was required to maintain these work-arounds. Let me back up, though, now and address some of the points that plaintiffs' counsel made. The plaintiffs have argued that our motion is based on an incorrect understanding of the law, and they're trying to characterize our argument as

requiring equivalence as a matter of law.

It's not our argument. We're not arguing that the UCL or the CLRA or a claim for unjust enrichment require as a legal matter the showing of equivalence. Our argument is -- it's not really even based on equivalence as such. Our argument is, each of their claims requires her to show damages.

Her theory of harm is where the equivalence matters because her theory of harm is, I wouldn't have bought the product if I had known about the work-arounds. That's why the equivalence or the lack of equivalence on this key feature of a guarantee matters, because when she is confronted by the notion that Symantec had no obligation to maintain the work-arounds, she is confronted with the fact that work-arounds don't give her the guarantee, which was the reason why she bought it.

She had to admit I might have bought it anyway, and again, it doesn't matter how many times she said something different. She doesn't get to create a factual dispute by contradicting her own sworn testimony. Now, it's frankly ironic to hear a plaintiff's lawyer arguing that some ruling that you made at the class certification stage is somehow binding on the merits.

Normally, they're saying you can't decide the merits at the class certification stage, but even setting

that aside, your ruling on class certification goes only to the question of whether it's possible for the plaintiffs to establish reliance and damages on a class-wide basis, and we obviously disagree with the Court's ruling. The ruling is what it is.

It's not a finding that the plaintiffs have in fact established materiality or reliance or causation with respect to Ms. Khoday's individual claim, and we have cited case law in our reply very clearly distinguishing between the nature of the inquiry made at class certification, which goes to what the plaintiffs may be able to prove on a class-wide basis, and the nature of the inquiry at summary judgment, which is whether the evidence in this case would allow a jury to award damages to Ms. Khoday specifically. That's a different inquiry. Your ruling at class certification is not binding.

I was also struck, though, by the repeated reference to necessity, that we somehow misled people into thinking that the product was necessary and the auto population misled people into thinking it was necessary. We cited record evidence in this case repeatedly that something like 50 percent of the consumers who were offered this insurance product removed it from the cart.

So if the theory is it is the necessity, people are being misled into thinking it's necessary, then I would

submit it's pretty clearly idiosyncratic and is certainly not uniform across the class, because 50 percent of the people who were given this option didn't think it was necessary. They took it out of the cart.

Now, we heard a lot about the alleged misrepresentations here. We heard a lot less about what our motion is actually directed at, which is the existence of harm and the amount of harm, but I want to comment then on their response to the guarantee point because I don't think it's persuasive at all. I don't think there is any legitimate dispute that EDS and NDI offered a guarantee, a legal right, a promise, and the alternatives did not.

What the plaintiffs have responded with is, frankly, a lot of efforts to change the subject. Instead of claiming that there was a legal right to use the work-arounds, the free alternatives, they talk about whether Symantec ever actually considered getting rid of them. That's irrelevant, right?

Ms. Khoday's testimony is crystal clear. She wanted to be sure, and it would be different, things may have been different if she had known that the work-arounds could disappear at any time. It doesn't matter whether they did disappear. It doesn't matter whether Symantec thought about making them disappear. The fact is --

THE COURT: What about the argument that they

could not have been made to disappear because of the fact that they were necessary for the 60-day guarantee and the multiple user option and these other aspects of it?

MR. GIBBS: Again, I think it is a, it's a red herring, but it's also not supported by the record. It is true that as a technical matter, the method for multi user, multi licensed users to download multiple times accessed the same back office system to download the product multiple times. That's the technical solution that Symantec chose to deal with that particular business problem.

But as we pointed out in our reply, the witnesses who talked about that issue made very clear, there were other alternatives they could have used to solve that problem. They decided to use this one. That doesn't mean they couldn't have chosen another way. They could very easily have set up a system where multi user, multi pack licensees used this method to download multiple times and still shut down the system they were using at the time.

That's just a technical issue. That doesn't mean they couldn't have done it another way. They chose to do it this way, that's true, but they could have done it another way.

Plaintiffs also make a big deal out of the fact that Symantec had an interest in making sure people had the

product on their machines. Of course they did. They're selling the product, but again, the fact that it was in their interests to have people have the product on their machines does not mean they were required to have the downloads up on the support site, for example. I mean, step back for a minute.

The downloads didn't appear on the support site until several years into this class period. It's clearly not the case that Symantec couldn't run its business without having those links up there. They did for the first several years of the class period. Right? So, yeah, there is a portion of time where they have the links up on the support site.

But just because they did not consider shutting them down or protecting them in some way to prevent people from doing outside of 60 days doesn't mean they couldn't have done that. They made a judgment that it wasn't worth doing. That doesn't mean they couldn't do it, and it doesn't mean that the work-arounds were in any way guaranteed in the same way that EDS and NDI were because those gave you a contractual right to do it. Nothing else did.

I want to address the inadmissible testimony point just a bit, Your Honor. First of all, most of that argument is focused on pieces of testimony which I agree we

have cited in reference, but it is not really at the heart of our motion, and that's the testimony about the material omission.

Now, I don't think that testimony is inadmissible. I don't think it's calling for an improper legal conclusion. Ms. Khoday did not express any confusion over the meaning of the term "material." I think she knew what she was answering, and that answer was based on her own perception of her own purchase of NDI.

So I don't think they're right, but it doesn't matter. You could ignore the testimony about material omission, and we would still be entitled to summary judgment based on her admission that if she had known about the work-arounds, but she had also known that Symantec could stop allowing the work-arounds at any time, she might still have bought NDI.

So the, all this stuff about material omissions, it doesn't really affect the motion. As to her answer to the question would you have bought NDI if you had known about the work-arounds and if you had known that Symantec could remove the work-arounds at any time, plaintiffs complain that it's an improper hypothetical question.

Again, fairly ironic, given that her claim is based on her testimony that if I had known about the work-arounds I would not have bought the product. That is

no less hypothetical than the question that we asked her in her deposition. The only thing, the only difference is, we asked her what she would have done if she had known the complete truth, which is not just that the work-arounds existed, but that Symantec was not under any obligation to leave them in place.

If she can answer the question, what would you have done if you had known the work-arounds existed, surely she can answer the question, what would you have done if you knew the work-arounds existed and you knew Symantec could remove them at any time.

Now, plaintiffs have said what they have to say about whether Symantec would have removed them or did remove them, but the fact is, Khoday herself admitted as I read when I got up here, she admitted they were not required to leave those in place. You put that testimony with the testimony that she may have bought the product anyway if she had known about the work-arounds but knew that Symantec could remove them, and she cannot prove harm, and she cannot prove the amount of her damages.

One last point on the evidence, and I'm tempted to read a bunch of excerpts, but I know we're short on time, so I won't get bogged down on that. If you read Ms. Khoday's testimony that is attached to my declaration, this is not general testimony. It's not hypothetical

testimony. It's testimony about her own state of mind and her own purchasing decision.

Now we may not have framed the question exactly the way plaintiffs' counsel wanted us to frame it, but we asked her, what would you have done if you had known this fact and this fact, and she answered that question. And her answer to that question precludes her from proceeding on a theory that she definitely would have done something else if she had known about the work-arounds.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Gibbs.

All right. Did you have something else?

MR. AXELROD: Your Honor, just briefly to one thing that Mr. Gibbs mentioned.

THE COURT: All right.

MR. AXELROD: I promise two minutes or less. Mr. Gibbs got up and cited you to a bunch of Ms. Khoday's testimony that he says proves that's the evidence in the record that shows that, that shows that the work-arounds could not have been, could not -- could have been removed. That's his evidence.

I just, when you look at that page, you will note that every single one of those questions was objected to by plaintiffs' counsel because she has no personal knowledge of that. She couldn't possibly have answered that. So if

that is what he is relying on, it's a fairly thin reed.

The only other point is that Mr. Gibbs said, well, plaintiffs are relying on her answers to the questions would you have bought it if you had known about the free alternatives but don't want to -- don't think -- think that the answers are improper when the question was, if you had known about the free alternatives but also knew they could have been removed.

Your Honor, she testified that she bought NDI because she was led to believe it was necessary. There is nothing hypothetical about that answer, and that's all we need to show harm. The questions that Mr. Gibbs wants to rely on are completely improper, and objections were raised at the time.

That's all I have, Your Honor.

THE COURT: Thank you, Mr. Axelrod.

MR. GIBBS: Just very briefly. I did cite Ms. Khoday's testimony about Symantec and whether it was required to do these things. I don't think there is anything objectionable about those questions or those answers, but I want to be very clear. I don't think it's our burden to prove that Symantec had the right to do it.

There is, in my view, a plain difference between buying a product that gives you a legal right to do something and relying on a bunch of self help work-arounds,

and I think if plaintiffs' theory is the work-arounds were just as much of a guarantee as this legal right, the burden should be on them to come up with evidence showing that Symantec could not have done that. In other words, that those work-arounds gave Ms. Khoday just as much certainty as the product she bought.

I think her admission stands, and I think it undermines their case, but just to be clear, I don't think it's my burden.

THE COURT: All right. Thank you, Mr. Gibbs.

All right. Let's turn to the plaintiffs' motion to exclude testimony of Stephens and Kalyanam.

MR. FRIEDMAN: Thank you, Your Honor. Again, it's Andrew Friedman with Cohen Milstein.

I think at the outset, it's important to understand what relief plaintiffs are seeking through this motion and what we're not seeking. Our *Daubert* motion here doesn't seek to exclude all the testimony of defendants' experts. In fact, we're only seeking to exclude portions of testimony from two of their purported experts, Mr. Kalyanam, Professor Kalyanam, and Mr. Stephens.

We acknowledge that both of them have experience in the general area of e-commerce, but portions of their anticipated testimony fall outside their expertise. They lack a reliable basis, and they're cumulative. Let's start

with their testimony for a minute on the supposed benefits of download insurance, also its value to customers.

THE COURT: Are you taking them both together?

MR. FRIEDMAN: I'm going to address both of them because they really do weave together, Your Honor.

THE COURT: All right.

MR. FRIEDMAN: But right now I'm addressing strictly the 702 standard. One of the things they both testified to was the free alternatives offered and comparing those free alternatives to download insurance, either NDI or EDS.

Those are topics that neither of these witnesses can testify under *Daubert*. Under Rule 702 of the Federal Rules of Evidence, expert testimony, as Your Honor knows, has to satisfy three prerequisites. We're not taking any attacks right here on their specialized knowledge that might be helpful ultimately to the trier of fact.

We're really focusing on the second two portions of that, the second prongs, that the proposed witnesses have to be qualified to assist the finder of fact, and they have to offer proposed evidence that's reliable in an evidentiary sense. They can't meet those two second two prongs.

Let's look at Mr. Stephens first. He is a 2000 college graduate, claims to have focused his career on,

again, the very broad topic of e-commerce and the retail industry. According to his expert report and his deposition testimony, he expects to testify on numerous e-commerce topics including the general landscape of e-commerce during the class period, the auto population of products into what we have been calling the customer shopping carts, and also generally about disclosures in e-commerce.

Now, other than the fact that much of this testimony will overlap with Professor Kalyanam's, we don't object to it, and I will get to the cumulative portion in a minute, but what is objectionable here, Your Honor, is that Mr. Stephens' testimony regarding the benefits of download insurance, how it was used, he has no expertise in how download insurance was used or how it could be valued by Norton customers, and he has certainly no experience, educational or otherwise, comparing this relative value to the free alternatives offered by Symantec.

He simply can't do that under *Daubert*. He has no educational qualifications, no experience to form these opinions. While he has worked generally in the e-commerce field, he admits he has no experience with download insurance at all. He has zero experience in re-downloading the Norton products using any of the methods, any of the free alternatives.

Not only did he testify that he never used download insurance, but he also testified he didn't even consider going to the Symantec website to look at it, and Mr. Stephens testified that he never used the free alternatives, either. Didn't try to use them, either. He never tried to re-download using the Symantec website.

He never tried to use Trialware, and again, he didn't try to go to the Symantec website. The most defendants can point to with regard to Mr. Stephens in terms of his qualifications is that when he consulted at some point in his career with Adobe, he said he gained an understanding of the challenges that they had with regard to downloading. That's a very slim reed upon which to rest his qualifications on this testimony.

His testimony is, he is talking about customer expectations, and he opines in his report that re-download options were fraught with problems. He has no qualification to talk about that. In fact, in his report, Mr. Stephens even presents a chart purporting to compare download insurance with the free alternatives.

And he professes that download insurance had several advantages to the free re-downloading alternatives. Again, unfortunately, he has just generalized knowledge about e-commerce, and that can't substitute for real knowledge here.

The same can be said for Professor Kalyanam. He, too, seeks to testify about add-on products in general, standard pricing methods in e-commerce and again the automatic pre population of products and services in shopping carts. For the most part, again other than the redundancy there, that testimony is not precluded under *Daubert*, and we're not trying to knock it out.

But again he has, Mr. Kalyanam, Professor Kalyanam has no expertise to opine about download insurance or the free alternatives. Yet in his expert report, Professor Kalyanam opines about the purported attributes to using download insurance, how much faster it was, how much more convenient it was than the free alternatives that were offered by Symantec.

Worse yet, he purports to describe in excruciating details, he claims, and in chart form, the steps one would take to actually use the download insurance, either Norton download insurance or extended download service, and he compares those to, to, again, the free alternatives.

Let's look at what Professor Kalyanam is. He's a professor of marketing. He asserts he has general experience in Internet marketing and e-commerce, but again, he has no background, no training in re-downloading options like EDS, NDI, and none of the alternatives. And like

Mr. Stephens, he never used EDS, nor even attempted to use it. Defendants admit this in their brief.

In short, defendants cannot point to any background or training for these witnesses as to the re-downloading options. They have no experience with EDS, NDI or any of the alternatives, but what defendants, we hear them say is, well, that's okay. We're a little short on qualifications, little short on experience, but that's okay because they have experience in e-commerce and marketing in general.

But that's like saying because I purport to be an expert on major league baseball, I could then talk about the specific construction of a baseball stadium. That's not what *Daubert* is all about. *Daubert* says the expert opinion has to be limited to the expert's specific area of expertise, and neither expert here have that expertise, that specific expertise with regard to re-downloading.

But let's for a minute ignore those gaps in qualifications. Let's pretend they don't exist. They would still violate the third prong of *Daubert* or 702. They completely lack reliable methodology. Under Rule 702, the expert's conclusions have to be susceptible to reproduction so it's objectively verifiable.

Now, that requires a showing that the opinion is based on some recognized methodology that is reliable, and

the first requirement for reliability under *Daubert* is to determine if the theory can be or has been tested, and defendants don't contest that.

They say neither Kalyanam nor Mr. Stephens did anything to test or evaluate their own conclusions. They never tested the re-downloading process. Neither of them actually used download insurance.

Neither of them tried to use the free alternatives, and frankly, that was evident in their testimony because they got a little confused about what the actual steps were, and neither of these witnesses conducted any research on Norton customers. They didn't conduct any research on download insurance purchasers or anyone that actually used the download insurance or the free alternatives.

Instead of looking at the objective data, each of these witnesses simply concluded that download insurance somehow saved time and was more convenient than the free alternatives, that is, but neither of them actually tested these conclusions.

With regard to each, virtually every one of their conclusions, at depositions we asked them, well, what did you do to test that? We said, did you, for example, did you interview customers to see how they reacted to the descriptions of download insurance? Did you ask any

consumers whether they found the alternatives difficult to use? Did you run a survey of how customers valued download insurance.

And each response was the same. No, I didn't do anything. I didn't do anything to objectively test those conclusions. Yet these witnesses purport to show in a descriptive, and both of them a chart form, the steps one would take to use extended download service, to use NDI and to use the free alternatives and making wildly inaccurate conclusions about how much faster, easier and how reliable it was.

Look, for example, Your Honor, at Figure 1, which is attached to Professor Kalyanam's expert report. It purports to depict two separate routes for re-downloading. One is an impossibly complicated route to re-downloading using the free alternatives, and the second one is this impossibly short route to re-download using download insurance.

Forgetting for a minute that they are factually inaccurate, wildly inaccurate, this chart and both witnesses' conclusions again aren't based on anything they did. All they did was, it's just rehashing defendants' testimony, defendants' arguments and sort of cherry-picking some testimony that they saw in the record. It's completely uncorroborated, and one of the hallmarks of

reliability is the ability to test what these purported experts did, but since they did nothing, their conclusions cannot effectively be tested here.

This requires that these witnesses' testimony on download insurance and the alternatives be stricken. Defendants again counter here, and they say, wait, these experts aren't testifying about scientific testimony, so their conclusions don't have to be testable.

Well first and foremost, *Daubert* doesn't make that decision. *Daubert* says everything has to be, all factors apply, whether it's nonscientific or not. Here with regard to download insurance, it's undisputed. All they did was essentially -- you'll forgive me. They're regurgitating the same tired descriptions that defendants have said all along how great download insurance is and how horrible the free alternatives are, but they didn't do anything on their own.

But if defendants are now saying that it's okay, we don't actually have to test anything, you can just rely on our experience, well, the advisory committee notes to 702 handle that. They actually say that raises the bar. If you're just going to rely on your qualifications, your experience, and you haven't done anything, you actually then have to explain how that experience leads to the conclusions that you got to.

They can't do that here, and as I've already noted, they simply don't have that direct experience in this area, so they really can't fall back on experience. They don't have it.

More importantly, because all these witnesses are doing here is parroting back certain testimony and documents from this litigation and defendants' own arguments made by their attorneys, they are not assisting the fact finder. The jury can look at the same record evidence and come to its own conclusions, look at any inferences it wants to make. It is not helping the jury at all.

Defendants claim that this lack of reliability can be tested at trial through cross-examination, but again, Your Honor, the role of the Court here is as the gatekeeper. It would be unfair to allow purely and obviously unreliable testimony to go to the jury because it would give the jury, frankly, the unfair impression it might give them more credence, these experts' testimony more credence than it frankly warrants because it's unreliable.

I just wanted to say a few words about the redundancy arguments, which are listed in our brief. With regard to both of these witnesses, they both take shots at one of our experts, Steven Gaskin, again not to be

confusing with local counsel here. They are taking shots at Mr. Gaskin's conjoint analysis.

Neither of them tested -- testified, by the way, that there is something inherently wrong with the conjoint analysis. They're not saying it's unreliable. They opine that Mr. Gaskin should not have focused solely on the automatic key injection as the differentiator between the free alternatives and the download insurance, and they also say he should have looked at other variables, but both witnesses' testimony on this also ought to be excluded.

Why is that? Well, with regard to Professor Kalyanam, he testified that a conjoint analysis is a standard marketing practice. It's a good tool that he teaches in his MBA program. He could have used the conjoint analysis. He just chose not to.

So he might have been able to opine on a conjoint analysis, but nevertheless, his testimony ought to be excluded under 403, and that's because defendants have already retained, and we have not objected to, a separate expert, a Dr. Van Liere, whose discipline and testimony here on the subject overlaps completely with Dr. Kalyanam's, and thus it would be cumulative.

You would have two witnesses to basically to attack -- I'm sorry -- to allow Kalyanam to rebut Mr. Gaskin's study. Now, with regard to Mr. Stephens, he

has the same issue under 403. It's equally cumulative. It's the same testimony as Dr. Van Liere, but in addition, Stephens is not qualified to opine at all on a conjoint analysis.

He has never done a conjoint analysis. He has never published in this area. He has never even reviewed the applicable literature. He simply isn't qualified. So you have under 702 and 403 as to his somewhat rebuttal of Mr. Gaskin.

Finally, the last point that we made in our brief bears noting. I won't go through all of it, but there is cumulative testimony, in addition to the testimony against Mr. Gaskin. Both Kalyanam and Stephens offer very similar, if not identical, testimony on several subjects, and we have summed them up on page 5 of our opening brief.

And those subjects include the auto population of customer shopping carts with download insurance as a standard practice. They talk about the lengthy informational disclosures like the descriptors in this case are somehow frowned upon in the marketing world.

They also equally testify that download insurance was safe, fast, convenient, all the things Your Honor has heard, and that download insurance was a common type of what they call a value added item that benefits customers. So these are identical testimony. It's absolutely

identical on those points that we have listed in the chart.

So even if the Court finds that any of this testimony could aid the trier of fact and that Stephens and Kalyanam are equally qualified to provide that testimony, the Court should limit defendants to call only one of them at trial and exclude the other's testimony as cumulative under 403.

Now, defendants don't dispute that these witnesses' testimony overlap on those points, but they claim this distinction, Your Honor. They say, well, one is an academic and the other is a marketer. To us that's a distinction without a difference. They're using the same materials, the same materials to review to get to those conclusions, and the conclusions are identical.

If they were both permitted to testify on the same topics, Your Honor, then you run into a prejudicial effect to the jury saying, well, they have -- essentially count the expert witnesses and say, well, there must be something to that because they have two or three expert witnesses on that topic.

The Court respectfully should require defendants to coordinate their testimony to avoid the overlapping and duplicative testimony. Thank you, Your Honor.

THE COURT: Thank you, Mr. Friedman.

Mr. Gibbs?

MR. GIBBS: Thank you, Your Honor. I apologize if my voice keeps giving out. The dry air is not what I am used to these days.

THE COURT: We have been heating it up a lot lately.

MR. GIBBS: Well, I appreciate that. Your Honor, I have some slides that I prepared. I don't intend to walk through them, but I intend to use them as a reference. I have shown them to plaintiffs' counsel. May I hand up a set?

THE COURT: Yes.

MR. GIBBS: With the Court's permission, I'll try to get this displayed on the screens. Okay. Can you see it, Your Honor?

THE COURT: Mm-hmm.

MR. GIBBS: Thank you. Okay. Mr. Friedman has just spent a substantial portion of his presentation, just as plaintiffs spent a substantial part of their briefing, trying to prevent these two witnesses from offering opinion testimony that they are not going to offer as opinion testimony, and so a substantial portion of this motion is simply misdirected and is based on a misunderstanding of the opinion testimony that these witnesses are going to offer.

Plaintiffs' principal complaint here is that

Professor Kalyanam and Mr. Stephens are not experts in download insurance, and they're not experts in re-downloading software; and therefore, plaintiffs claim, they have no basis for offering opinions about how EDS or NDI worked, how the work-arounds worked or how those two things compare to one another, but the fact is, neither of these witnesses is offering opinion testimony on those subjects.

Those subjects, in my view, are questions of fact. What both of these witnesses have done is, they have gained an understanding of how EDS and NDI work. They have gained an understanding of how the alternatives or the work-arounds work, and they have gained an understanding of how the two differ from one another, and they have done so by looking at the record evidence in this case.

They have looked at deposition testimony. They have looked at documents produced in the case, and their reports very clearly document the sources that they're relying upon for their understanding of how EDS and NDI worked and their understanding of how the work-arounds worked.

That understanding forms a part of the factual basis on which they have then applied their experience, their expertise, their research to form opinions that go well beyond the factual issues that the plaintiffs are

complaining about.

So what is really going on here is, the experts have reviewed some of the evidence in the case to gain a factual understanding, and then they have applied their expertise and their experience to form other conclusions about the value that EDS and NDI offer to consumers beyond what the work-arounds offered.

There is absolutely nothing unusual about experts looking at record evidence to gain an understanding of certain facts and then applying their expertise or their experience to form conclusions which are separate and apart from those underlying facts.

And so the simple fact is, we're not offering Professor Kalyanam or Mr. Stephens to offer an opinion about how EDS or NDI worked. They have an understanding about that that is based on the evidence, and if plaintiffs think their understanding is incorrect, they can cross-examine them at trial.

We're not offering them to give opinions about how the work-arounds work. They have an understanding about that based on the evidence, and plaintiffs can cross-examine them on that as well. The fact that they have grounded their opinion in certain facts does not mean that they have to have experience or expertise in those factual issues in order to give their opinions.

So plaintiffs are focusing on the wrong target here.

THE COURT: Mr. Stephens references something called conversion analysis in his report. What does that mean?

MR. GIBBS: Conversion analysis, I believe is, I think it's conversion ratio, and I think what he is talking about is a comparison of the number of unique visitors who come to your sight versus how many of them actually make a purchase. So in a sense how many visitors do you convert into a sale.

I believe that's what he is talking about there, and that's just some of the background of his analysis of various of the things that Symantec and Digital River did here because, you know, the principal goal of any e-commerce retailer is to have as high a conversion ratio as possible.

Now, so plaintiffs have shot at the wrong target for the most part. Plaintiffs then pivot in their reply and say, well, these guys are just regurgitating the record evidence. They're just constructing a narrative, and that's not proper as well, but that's not a fair characterization of the opinion testimony that these witnesses are offering, again as distinct from their discussion of some of the factual information that they've

relied upon to form their opinions.

And I don't want to dwell on a lot of detail because I know we're short on time, but I want to focus for an example on an opinion offered by one of them that I think is basically what the plaintiffs are complaining about here.

All right. This is the summary of opinion number three from Mr. Stephens's report. Mr. Stephens, although he only graduated from college in 2000, is unquestionably a very real expert in e-commerce. He has been working in e-commerce since that time, which essentially encompasses the entire time that there has been any such thing as e-commerce.

His e-commerce experience includes helping other software vendors set up e-commerce sites to sell software over the Internet via downloads, just like Symantec was doing at the time period in question.

Mr. Stephens has looked at the record evidence about what EDS and NDI offered and how the free alternatives or the work-arounds worked, and based on his experience with difficulties that retailers and their customers encountered in dealing with software downloads over the Internet, he has reached a conclusion that nonexpert users who were buying software during the 2005 to 2011 time frame would have been familiar with those

difficulties that people encountered in downloading software.

And it is his opinion based on that experience that in light of their awareness of those difficulties, purchasing EDS or NDI would have been attractive to consumers. They would have seen value in what those products were offering.

There is nothing unusual or strange about that sort of opinion. It is grounded in part on their understanding of the facts based on the record evidence, and it is grounded on his deep experience in e-commerce. It is unquestionably of help to the jury.

Professor Kalyanam offers a similar opinion in the sense that he also believes that these products would be valuable to consumers, but it comes from a very, very different perspective. His opinion on this subject is not based on personal experience helping people set up web sites to sell software.

His experience is based on his academic experience and on published research, and he has looked at research about how consumers value their time, how they value certainty over uncertainty, how they value convenience.

Based on that published research and based on his understanding of the facts about how EDS and NDI differed

from the work-arounds, he has concluded that these products offered value to consumers because they offered an easier process, a more convenient process, a more certain process. That's the gist of his opinion.

It is not a matter of offering opinion testimony about the underlying facts. It is an opinion they have formed based in part on factual information from the record. Let me move now to a slightly different subject.

Plaintiffs want to exclude both of these witnesses from offering commentary on their expert, Mr. Gaskin's, conjoint analysis. Here these two experts are clearly different. Mr. Stephens is not offering an opinion about Mr. Gaskin's conjoint analysis.

He notes in passing in his report that Mr. Gaskin's conjoint analysis only attempted to value, place a value on the automatic key injection feature of the product. That fact is not in dispute, and so Mr. Stephens is not offering an opinion when he notes that fact.

All he is doing is saying, because of that limitation on what Mr. Gaskin did, which again is undisputed, because of that limitation what he has done is not inconsistent with the conclusions I'm reaching, and I don't think there is anything in *Daubert* or Rule 403 that precludes Mr. Stephens from explaining why his conclusions about value to customers are not inconsistent with what

Mr. Gaskin did because of an admitted limitation of Mr. Gaskin's work.

So that's not an opinion at all, and it's not really repetitive of what the other experts are doing. Professor Kalyanam does have a series of opinions about what Mr. Gaskin did, and plaintiffs don't question his expertise and experience and his ability to comment on that.

They take issue with the fact that he didn't do his own conjoint analysis, but there is no requirement that someone do that in order to analyze and critique an analysis that someone else has done. So their principal complaint about Professor Kalyanam is really just, I think, it's duplicative of what Dr. Van Liere did.

In that regard, there is at most some overlap between the points that they make, but again, they're making it from very different perspectives. Among other things, Professor Kalyanam believes that the use of Dr. Gaskin's conjoint analysis in this setting is of limited value because what it's measuring is something called stated preference, what people say they value, as opposed to revealed value, which is what people actually do out in the marketplace.

And that is something that Dr. Van Liere, for example, does not touch on at all. Dr. Van Liere is an

unquestioned expert in performing conjoint analyses, and he has some pretty serious criticisms of Mr. Gaskin's work here, but Dr. Van Liere does not in any way touch on whether using stated preference versus revealed preference is an appropriate way of measuring value here.

So, you know, to the extent there is overlap it's limited. It doesn't come anywhere near a 403 prejudice requirement. They are coming at it from different perspectives and largely offering different testimony.

More generally on the overlap point as it relates to Mr. Stephens and Professor Kalyanam, first of all, the actual overlap, places where they are saying the same things, is quite limited. They both testify that it's not unusual to auto populate a cart. That testimony is, I agree, similar.

They both offer testimony about lengthy online disclosures, although I don't think that testimony is anywhere near identical. It's touching on the same subject, but they're not saying identical things about that. More importantly, they're coming at it from very different perspectives.

Mr. Stephens's opinion on that point is obviously based on his experience helping vendors set up e-commerce sites, setting up his own e-commerce site and testing consumer reactions to various disclosures.

Professor Kalyanam's testimony about lengthy online disclosures is based on published research, not on his own experience, and so I don't think that's duplicative. It's not at all unusual for there to be more than one expert covering a similar subject matter.

In fact, just last year in the *Burks versus Abbott Laboratory* case at 917 F.Supp.2d 902, this Court allowed three experts all to testify as to causation, among other things. You know, what we're really talking about here is a 403 analysis. This is not a *Daubert* issue.

And frankly, I think any consideration of cumulative or duplicative or prejudice is just way too premature. All we have is their disclosures. Neither one of them has actually taken the stand. There is no way for the Court to actually conclude that prejudice from duplicative testimony outweighs probative value when you haven't heard one of them testify.

So I don't think there is any basis for the Court at this stage of the proceedings to tell the defendants you have to pick one. You can't have two. I just don't think that's appropriate at this stage of the proceedings. Couple of more points. Excuse me.

As we said in our opposition brief, plaintiffs' motion cites all sorts of case law talking about testing your results and being able to reproduce your work and your

methodology. They're citing a bunch of cases dealing with scientific testimony where those kinds of categories and those kinds of analyses actually make sense.

As we have said in our briefing, nonscientific testimony isn't necessarily evaluated using those categories. Now, I heard Mr. Friedman say that *Daubert* says all factors apply. That's just wrong. Plaintiffs themselves cite the *Kumho Tire Company versus Carmichael* case from the United States Supreme Court. That is at 526 U.S. 137.

This was one of the first follow-on cases to *Daubert*, and the question was, for nonscientific expert testimony, do you have to apply all of the factors that *Daubert* lists, and the answer is, no, you don't.

What the Supreme Court said in *Kumho* is, it's going to depend on the specific testimony. In some cases for some testimony, those categories might be appropriate even for nonscientific testimony. In others, they will not.

The bottom line is, they said the trial court has the same discretion in deciding how to evaluate nonscientific testimony as it does in deciding whether to let it in. So there is nothing in *Daubert* that says you have to click through all of those categories, which many of those are very focused on scientific testimony, in every

case for every kind of expert testimony.

There is lots of testimony where those categories simply do not make sense, and I would submit this is precisely one of those categories. Thank you, Your Honor.

THE COURT: Thank you, Mr. Gibbs.

I have about maybe 17 minutes more here because I have a sentencing at one o'clock or a series of sentencings. We've got three additional motions regarding defendants' motions on expert testimony.

Who is going to be making the arguments on those?

MS. VAN GELDER: Your Honor, I'll be making the argument on the Gaskin *Daubert*.

MR. GASKINS: To avoid confusion, and I will be making the argument on Professor Kalyanam.

MS. FROGGE: I will be making the argument on *Daubert* of Mr. Nicholas Taylor.

THE COURT: Okay. Well, let's start right away with the argument on the testimony of Mr. Gaskin, and then let's just try to get this done if we can.

MR. FRIEDMAN: Your Honor, may I be heard just for two minutes?

THE COURT: I don't know that I need any response on the last motion. I don't typically do that on these, so let's just go ahead.

MS. VAN GELDER: Thank you, Your Honor, and this

one is a little bit complicated, but I'll try to speed through it as quickly as I can. Just by way of background, conjoint analysis is a method of market research that is used to measure relative preferences for product features. Thus, for example, if somebody properly employs a conjoint analysis, they can say that the survey respondents value a car with a sun roof to some extent more than a car without a sun roof, and conjoint can get to that extent.

But to be clear, value in this context is not equivalent with price in the real world market. Value is consumer utility, what sort of subjective utility did consumers place on that particular feature when they were taking the survey.

So in this case, plaintiffs hired Mr. Gaskin to devise a conjoint survey that ostensibly would attempt to place a dollar value, a monetary value on automatic key injection, which Your Honor is aware is one of the features of extended download service in Norton download insurance.

Gaskin comes to the end of the survey and ultimately reaches the opinion that the, quote, fair market value of automatic key injection is between 5 and 16 cents, and it's this testimony, Your Honor, that we find objectionable as both unreliable and irrelevant.

You will recall, and we have discussed it today, that this download button appeared when folks bought

Norton, and EDS and NDI extended the time that that download button would be available in folks' accounts, and because it was in the purchaser's account, it automatically injected the product key, that 25 character code.

In this case, plaintiffs claim that EDS and NDI weren't necessary. That's what Mr. Axelrod said this morning because these work-arounds existed, and ignoring various record evidence with respect to the guarantee or convenience, safety, peace of mind, related to EDS and NDI that defendants intend to prove existed, plaintiffs are going to try to prove that the only difference between the work-arounds and, on the one hand, and extended download insurance and Norton download insurance on the other was this manual key entry versus automatic key entry.

Thus, they hoped to measure the monetary value of automatic key injection and then subtract that amount from the EDS and NDI purchase price as a measure of damages. Enter Gaskin. So Gaskin to monetize automatic key injection develops this survey based on hypothetical re-download products, not EDS and NDI, but hypothetical products, some of which included automatic key injection and some of which did not.

He surveyed 333 people and presented them with various choice sets of varying products with different attributes, and for each of the choice sets for which they

were presented, the survey respondents picked their preferred choice, and then Gaskin converted those answers to a consumer utility value, which is not equivalent to price.

And then he purports to take the consumer utility value that consumers placed on automatic key injection and convert that into absolute dollar equivalence finding it is 5 to 16 cents. From there, without any scientific support, he jumps from his hypothetical survey out into the real world and says the fair market value of automatic key injection is 5 to 16 cents.

The problem with this testimony is twofold. It's neither reliable, nor is it relevant. It's not reliable because the scientific literature that supports conjoint does not allow to place a single monetary value on a single attribute of a product.

The Sawtooth Software literature, and Gaskin used Sawtooth Software in his study, and we have attached that to our brief in Exhibit 4, specifically says that you can't do it. That's what Gaskin is trying to do, because automatic key injection is a single attribute in the hypothetical products he is testing.

Moreover, no court has accepted conjoint for this purpose. We have only found one court that has considered it. It is the *In Re: Tobacco* case, California Superior

Court, and we have attached the opinion at Exhibit 5, and the court expressly found when it considered a study that attempted to do this that, quote, Conjoint analysis has not been accepted in the relevant scientific community as a means of assigning a monetary value to any particular product attribute.

You know, plaintiffs dismiss this case because this opinion wasn't written in response to a motion to exclude the experts, but the underlying opinion there, the conclusion is still valid. The court finds it's not reliable. It's not scientifically accepted.

Moreover, every case that accepts conjoint, the expert is valuing the product as a whole, and that includes the recent *Whirlpool* decision that came down out of the Northern District of Ohio, 2014 Westlaw 4954467. There, the expert was analyzing defects in washing machines, and she determined that washing machines without the defect were worth some amount more than washing machines with the defect.

What do plaintiffs do here? They're attempting to justify what Gaskin did by explaining in their response that what he did was measure value of relative preferences. Despite his ultimate conclusion, they say what he actually said is that a service with automatic key injection is worth 5 to 16 cents more than a re-download service without

automatic key injection.

Well, this might be true within the confines of Gaskin's hypothetical study, but plaintiffs take this a step too far. They take those consumer utility values, the subjective values that were constructed in this hypothetical survey, and they apply them outside to the real world market where they claim these work-arounds defendants did not charge for. So they have a value of zero; and therefore, EDS and NDI are necessarily only worth 5 to 16 cents more than that.

But if you look at the study, Your Honor, there was a consumer utility value on the products that were supposedly equivalent to the work-arounds in Gaskin's survey. So consumers didn't value the work-around as zero. They valued them as something, so we can't compare Gaskin's numbers that he developed in the hypothetical world to the real market values out in the real world.

Whether it's adding 5 to 16 cents to zero or subtracting 5 to 16 cents from the price, and for this reason his study is totally unreliable, and this is also why he can't opine on fair market value. He admits he didn't measure real products.

He hasn't explained how the 333 people are representative of the market and can be extrapolated out to the market. He doesn't explain how the measurements that

he has made at all apply to supply and demand such that he can say anything about fair market value, and there is simply no authority that a hypothetical survey can tell us anything about fair market value in the real world, and plaintiffs haven't cited any.

Quite simply, Gaskin is reaching beyond the scope of his expertise and beyond the limits of his study, but his study is also excludable because it's not relevant to any issue in this case. I think that we should think very closely about what the issues are when we think about this.

Plaintiffs claim, as Mr. Axelrod told you this morning, that Symantec's customers were tricked into buying EDS and NDI because defendants supposedly misrepresented that it was necessary. They claim that EDS and NDI weren't necessary because these work-arounds existed, and had people known of these work-arounds, they wouldn't have purchased EDS or NDI or at least they wouldn't have paid as much for it.

Then they claim that the class is entitled to damages measured as what they paid versus the value received, but this is not what Gaskin measured. Gaskin did not test whether and how much consumers would pay if they knew that EDS and NDI weren't necessary. In other words, Gaskin did not test the value of EDS and NDI without the allegedly misrepresented attributes.

Now, plaintiffs claim that it was this representation as to necessity that gave EDS and NDI their supposedly false value, but they have not taken away that representation to be able to tell this Court or the jury what worth is left. Therefore, Gaskin's testimony says nothing about causal nexus or damages, as plaintiffs claim.

Second, second with respect to the damages point, as Mr. Gibbs touched on this morning, Mr. Gaskin has not measured the value that the class members received when they purchased EDS and NDI. Plaintiffs attempt to equate EDS and NDI to automatic key injection, but the fact of the matter is, as I told you at the beginning here, they got this download button in their account, and they got it for the full year, and that could have some value to some class members.

So -- but all he did, all Gaskin did was attempt to place a fair market value on one component of that button, the automatic key injection. He never opines on the value of the entire service, and he only opines on the value, the fair market value of the automatic key injection.

How does this relate to damages? The answer is, it doesn't because customers received something more than automatic key injection. They received the right, the guarantied right to go back to their account to

re-download. Even though plaintiffs might not credit some of the other features that we claim these products had, safety, convenience as compared to the work-arounds, reliability, peace of mind, they can't seriously dispute that defendants gave the customers what they promised, which was that download button in their account.

So the question is, would customers pay for that even if they knew the work-arounds were available, would they value it all? We don't know this because Gaskin did not attempt to answer this question. Lead Plaintiff Khoday certainly didn't know it. As Mr. Gibbs said this morning, would she have purchased it? Maybe, maybe not.

If customers did value receiving that download button despite the work-arounds, would they be willing to pay for it? We don't know because Gaskin didn't test that, either. Thus, his testimony is not relevant to the question of damages. It doesn't allow the fact finder to determine between what the class members paid and what they received.

For these reasons, Your Honor, and the others stated in our brief we would ask that Gaskin's report and testimony be excluded.

THE COURT: All right. Very well. Thank you.

MS. VAN GELDER: Thank you.

THE COURT: I think that we just have time for a

response on Mr. Gaskin, and then we'll just have to take the rest on the papers. We're just running out of time today.

MR. McNAMARA: Thank you, Your Honor. Let me just start out by saying, you've got an incorrect version of what conjoint analysis does. You do get a consumer utility, but that is just step one after the participants have gone through the different tables, the different screen shots, the different attributes.

It does result in the consumer utility, and then you apply the regression analysis, and then you get the willingness to pay. The willingness to pay is a monetary value. Conjoint analysis would not have been around for 30 years and being used all over the marketplace for all sorts of issues if all you got was a consumer utility.

You get a dollar, and with that dollar, you then use it for planning purposes, what are you going to charge, how much more can you get, how is this going to affect our market. These are all uses of it, and we gave Your Honor a litany of articles in our brief where they used conjoint in many different facets.

Now, what Mr. Gaskin did with his willingness to pay numbers, he followed Sawtooth Software's suggestions and used a market simulator. The information in the five-page article from 2001 that they attach about, hey,

you really should be careful when you use our software that you do these extra steps, he did those extra steps.

He ran the market simulations. He did the constraints. He compared attributes. He did all the things that were suggested. He did exactly what was suggested by Sawtooth to avoid a situation where you would have a misleading number. By the way, the misleading number mentioned in that Sawtooth article was you might overestimate if you used the software incorrectly.

If he overestimated with a nickel to 16 cents, that would be really, really sad for the defendants. He did not. He used the Sawtooth Software accurately. One particular expert who did not was Mr. Steckel in the "light" cigarettes case. That was one of the many reasons that Judge Prager as a factfinder at trial rejected it.

It was a state court case, also. It wasn't even a *Daubert* issue. Other differences, by the way, in that particular case is, it dealt with a completely hypothetical product, a safer cigarette. We're not talking about a hypothetical product or hypothetical services.

We're talking about free alternatives, which add a manual key injection, and NDI or EDS, which had automatic key injection. He choose correctly, as I point out. He choose to focus on the convenience aspect. That's what he was asked to assume was the only one that matters.

Why? Well, that was what was advertised. What was not advertised is, it's guaranteed or as christened today by Mr. Gibbs, certainty. Certainty is never once mentioned in that what is this descriptor. It is never once mentioned in any single Power Point discussing the attributes internally about NDI or EDS.

Why? Because they never thought of removing this. It was never an issue. It was never, if you buy this download service, we guarantee it will always be there. They didn't advertise it that way. You don't add in attributes that aren't advertised to figure how the market is going to react to it in order to assess an extra value like they would want.

He took what was advertised there, which was convenience. The other factors they talk about, safety, security, we're talking about downloading from Symantec's site or store with Trialware. There is no safety issues of it. They weren't spamming their own people. They weren't putting spyware on their own people.

Now, if he choose wrongly or too narrowly, the jury can say so. The jury can say you didn't consider enough factors. It all goes to the weight. It does not go to admissibility, and in terms of any courts that have accepted conjoint, we provided this earlier via e-mail to Your Honor. I could give you your copies if you want hard

copies of the *Whirlpool* case.

It's a consumer class action case. It was not a patent case. There is no issues about *Georgia-Pacific* factors and figuring out a reasonable royalty. It was the expert figuring out specifically if you had the disclosure, not the damage, but if you had this disclosure that you were going to have to do this extra work to not have a smelly washing machine, how much less would you pay.

That's what the end result of that survey was, and it was accepted, and the arguments the defendants make here, it adds some hypothetical distractor factors. It didn't have the right group. It was too broad. The Court rejected it. The reason the Court rejected it, Your Honor can read yourself pages 22 through 24, this is how conjoint is used in the commercial marketplace.

It is used to compare sometimes hypothetical aspects. It has distractor variables. This is consistent with how it's used non litigation wise. The fact that it included a group that wasn't necessarily all class members wasn't a hindrance. It actually can be a positive. You don't have the bias of someone saying, oh, I remember that product, and I'm unhappy with it.

There is nothing in what Mr. Gaskin did which is patently contradicted using conjoint analysis, and Dr. Kalyanam doesn't say so, and Dr. Van Liere doesn't say

so. That is something that came up in the briefing in the *Daubert*. None of their experts ever hinted, well, this is categorically the wrong way of using it. You're using consumer utility, and this is a terrible insult to conjoints anywhere.

Let me just if I can add, if there is anything else to add, just that the amount of number used, 333, by Mr. Gaskin, that's more than the 309 that was used in *Whirlpool*. That's more than the 300 or so that was used in Dr. Van Liere's survey in *Convolve*, which is a case we mentioned. 250 is the normal number for surveys.

There is just nothing in anything he did which is categorically improper that would justify getting rid of it. This is as in *Synergistics* and other cases primarily issues for the jury. If they want to consider it, they can. It goes to the weight. It doesn't go to the admission.

THE COURT: All right. Thank you, Mr. McNamara. I am sorry. I have to conclude the hearing because I have got this other matter scheduled. I will take the other motions on the papers, and I think they are well discussed by both sides.

So thank you for your arguments today. The Court will take the motions under advisement and will issue a written order as quickly as possible.

MR. FRIEDMAN: Your Honor, just a couple of housekeeping matters.

THE COURT: Yes. Go ahead.

MR. FRIEDMAN: There is also the unopposed motion on the claims.

THE COURT: Right.

MR. FRIEDMAN: And we would also like to ask Your Honor's goals in terms of a trial date.

THE COURT: Well, let's get through the Court's order on this particular, particularly on the summary judgment motion, and at that point, we'll focus on what's left and what we need to go forward with.

MR. FRIEDMAN: Thank you, Your Honor.

THE CLERK: All rise.

(Court was adjourned.)

* * *

I, Kristine Mousseau, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/ Kristine Mousseau, CRR-RPR
Kristine Mousseau, CRR-RPR